MOHAMAD HASSAN & ORS

v.

DEWAN BANDARAYA KUALA LUMPUR & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-21-133-2000]
8 MAY 2001

CIVIL PROCEDURE: *Affidavits - Jurat - Form of jurat - Rules of the High Court 1980, O. 41 r. 1(7) & (8) - Non-compliance - Effect*

The plaintiffs filed an application by way of an *ex parte* summons in chambers ('encl. 2') for, *inter alia*, an order to injunct the defendants from evicting the plaintiffs. The summons was supported by an affidavit affirmed by one of the plaintiffs. However, contrary to O. 41 r. 1(7) Rules of the High Court 1980 ('RHC'), the deponent did not sign immediately after the affidavit's last paragraph. The issues in questions were: (i) whether the affidavit was defective; and (ii) whether encl. 2 could stand without a supporting affidavit.

Held:

[1] The effect of non-compliance with the first limb of O. 41 r. 1(7) RHC rendered the affidavit invalid. (p 297 g)

[2] The affidavit was defective as the deponent did not depose that he affirmed the affidavit based on information or belief, and furthermore, he did not reveal the sources or grounds of the information and belief. This was contrary to O. 41 r. 5 RHC. (p 298 c)

[3] Bereft of an affidavit in support, encl. 2 failed. (p 298 h)

[Enclosure 2 dismissed.]

Case(s) referred to:
AG v. Parson [1956] AC 421 ***(refd)***
American Cyanamid Co v. Ethicon Ltd [1975] 1 All ER 504 ***(refd)***
Anderson v. Stather [1845] 9 Jur 1085 ***(refd)***
Castle Fitness Consultancy Pte Ltd v. Manz [1990] 1 MLJ 141 ***(refd)***
Datin Melati Abdullah & Ors v. Syed Hassan Syed Salim [1999] 5 CLJ 582 ***(refd)***
Han Euu Tiam v. Phang Kui Fatt & Ors [1999] 4 CLJ 395 ***(not foll)***
Mohd Nazir Badar Shair v. Timbalan Menteri Dalam Negeri [2000] 2 CLJ 805 ***(foll)***
Pickwick International Inc (GB) Ltd v. Multiple Sound Distributors Ltd [1972] 3 All ER 384 ***(refd)***

Richard Wheeler Doherty v. James Clagston Allman & WC Dowden [1878] 3 App Cas 709 ***(refd)***

Savings and Investment Bank Ltd v. Gasco Investments (Netherlands) BV & Ors [1984] 1 WLR 271 ***(refd)***

Syarikat Telekom Malaysia Bhd v. Business Chinese Directory Sdn Bhd [1994] 2 CLJ 729 ***(refd)***

Tan Suan Choo v. Majlis Perbandaran Pulau Pinang [1983] 1 MLJ 323 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 41 r. 1(1), (7), (8), 5

Other source(s) referred to:

Britannica World Language Edition Of The Oxford Dictionary, vol 1, part 1

For the plaintiffs - Ranjan Chandran; M/s Ranjan Chitravathy & Co

Reported by Izzaty Izzudin

JUDGMENT

Abdul Malik Ishak J:

Introduction

This was an application by fifty-two (52) plaintiffs by way of an *ex parte* summons-in-chambers in encl. 2 for the following orders:

(i) to injunct both the defendants whether by themselves or through their workers or agents or others **from** destroying or demolishing the houses or structures located on a piece of land known as HS(D) 49259 P.T. 899, Mukim Petaling, Negeri Wilayah Persekutuan (hereinafter referred to as the "said land") and **from** severing the supplies of water and electricity to the said land or **from** evicting the plaintiffs from the said land;

(ii) costs would be costs in the cause; and

(iii) any other relief or consequential order which this Honourable Court deems fair and just.

and it was supported by an affidavit in encl. 3 that was affirmed by one Mohd Sawal bin Md. Zain ("Sawal"), the 30th plaintiff in this application. Enclosure 2 was dated 23 September 2000 and it was filed on the same day. Sawal affirmed encl. 3 on 23 September 2000 at 9.30am and it was filed on the same day at 11.45am.

Facts

Within a short compass, the facts may be stated as follows. The first defendant – Dewan Bandaraya Kuala Lumpur, issued a notice dated 30 August 2000 to all the occupants of the said land to vacate their houses within thirty (30) days and if those occupants failed to do so consequential actions would be taken against them. The notice to vacate would expire on 30 September 2000. The occupants of the houses were the plaintiffs and they had built houses on the said land – popularly known as Kampung Sungai Midah Dalam, Cheras, Kuala Lumpur.

The first defendant as the owner of the said land had alienated the same to the second defendant – Syarikat Perumahan Pegawai Kerajaan Sdn Bhd. That alienation took place in 1985. There was a general averment to say that the first defendant knew that the plaintiffs were occupying the said land. There was also a general averment to the effect that the second defendant knew and was aware of the houses and structures on the said land at all material times.

Sometime in early 1990, the second defendant obtained the consent of the first defendant to develop the said land into a satellite township. There were some discussions between the plaintiffs and the defendants in regard to re-location and the compensation sums which the plaintiffs would be receiving. It was averred that in 1993, the second defendant had in actual fact assisted the plaintiffs in applying for electricity and water supplies to the said land. It was also averred that in July 1999, the second defendant conclusively informed the plaintiffs of their re-location and that the plaintiffs would be re-located at certain units of flats. There was, unfortunately, a condition attached to the offer and that was: each plaintiff was required to purchase a flat at the purchase price of RM25,000. The plaintiffs, so it was said, could not afford to purchase those flats. It was the stand of all the plaintiffs that they were promised compensation and now they were asked to purchase those flats.

An averment was made to the effect that the plaintiffs had stayed on the said land for the last 40 years with the permission of the defendants. The plaintiffs averred that they were not squatters simpliciter but rather they were licence holders and had equitable rights to the said land. The plaintiffs also gave their undertaking as to damages. For all these reasons, the plaintiffs sought for the orders as per encl. 2.

Refusal To Allow Enclosure 2

I refused to allow encl. 2. Whilst I agree that an interim *ex parte* injunction against the first defendant may be obtainable on the authority of *Tan Suan Choo v. Majlis Perbandaran Pulau Pinang* [1983] 1 MLJ 323, and that

an interim *ex parte* injunction can certainly be issued against the second defendant, yet I was cautious.

Enclosure 2 was supported by encl. 3. The application in encl. 2 depended entirely on encl. 3. I have since perused through the affidavit of Sawal in encl. 3 and it brought into sharp focus O. 41 r. 1(7) of the Rules of the High Court 1980 ("RHC"). That Order states as follows:

> (7) Every affidavit must be signed by the deponent and the jurat must be completed and signed by the person before whom it is sworn.

This would be followed by O. 41 r. 1(8) of the RHC which states that:

> (8) A jurat must be in one of the forms in Form 78.

Sawal affirmed an affidavit in the Malay language as seen in encl. 3. That affidavit must be signed by him. After he has signed that affidavit then he must ensure that "the jurat must be completed and signed by the person before whom it is sworn". At p. 13 of Sawal's affidavit in encl. 3, the last paragraph was para. 26 and it was worded as follows:

> 26. Atas sebab-sebab yang dinyatakan di atas kami dengan rendah diri memohon suatu perintah seperti yang dipohon.

Immediately after para. 26, Sawal should have signed his affidavit (*Anderson v. Stather* [1845] 9 Jur. 1085). This was not done by him and this went against the requirement of the first limb of O. 41 r. 1(7) of the RHC. Rightly after para. 26 of encl. 3, the following affirmative words, now legally known as the jurat, should be employed:

DIIKRARKAN oleh MOHD	)	
SAWAL BIN MD ZAIN	)	
(No: KP. 4987730) di	)	
Kuala Lumpur pada	)	
haribulan 23 SEP 2000	)	...
pada pukul 9.30 pagi	)	(Tandatangan Mohd
(melalui terjemahan oleh [penterjemah)		Sawal bin Md Zain)
tidak perlu])	)	

and the English translation would be worded in this way:

AFFIRMED BY MOHD	)	
SAWAL BIN MD ZAIN	)	
(NRIC No: 4987730)	)	
at Kuala Lumpur on	)	
23 SEP 2000 at	)	...
9.30 a.m. (through the	)	(Signature of Mohd

a interpretation of [interpretation) Sawal bin Md Zain)
not required]))

It must be borne in mind that the word "must" is employed on two occasions in O. 41 r. 1(7) of the RHC. It has often been said that the word "must" is *prima facie* imperative and it admits of no discretion just like b the word "shall" (*Attorney General v. Parson* [1956] AC 421). The *Britannica World Language Edition Of The Oxford Dictionary*, vol. 1, Part 1 defines the word "must" to mean "expressing necessity; obliged or required to". The same dictionary further states that "in the first person, must often expresses an insistent demand or a firm resolve on the part of c the speaker." *The Concise Oxford Dictionary*, 9th edn, Thumb Index Edition defines the word "must" to mean "be obliged; be certain to; ought to; expressing insistence". Thus, it is one of necessity and obligatory on the part of Sawal to sign his affidavit after para. 26 thereof. Thereafter Sawal should proceed to comply with the second limb of O. 41 d r. 1(7) of the RHC. That second limb talks of the "jurat" that "must be completed and signed by the person before whom it is sworn". Obviously Sawal complied with the second limb of O. 41 r. 1(7) of the RHC and I have no quarrel with that except that the jurat should not be entitled and I have more to say of this later. The compliance by Sawal in regard to e the second limb of O. 41 r. 1(7) of the RHC seemed to be in total accord with the decision of Hishamudin Yunus J in the case of *Han Euu Tiam v. Phang Kui Fatt & Ors* [1999] 4 CLJ 395 which, *inter alia*, held that the jurat must be entitled. In the context of encl. 3, Sawal must sign the affidavit before a Commissioner for Oaths. Thus, the signature of the f Commissioner for Oaths would appear in this way (using the English language version):

AFFIRMED BY MOHD)
SAWAL BIN MD ZAIN)
(NRIC NO: 4987730))
at Kuala Lumpur on)
g 23 SEP 2000 at) ...
9.30 a.m. (through the) (Signature of Mohd Sawal
interpretation of [interpretation) bin Md Zain)
not required]))

h Before me,
...
Commissioner for Oaths.

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It would be pertinent to say that the entitlement to the jurat in encl. 3 began on the page where the substantive part of the affidavit ended – it was right after para. 26, and the jurat was then concluded on a fresh page. There was nothing in the RHC that requires that the whole of the jurat must begin and end on the same page. I agree with that part of the judgment of Augustine Paul J in *Mohd Nazir bin Badar Shair v. Timbalan Menteri Dalam Negeri* [2000] 2 MLJ 559, when his Lordship said (see the selected portion of p. 560 of the headnote under Held (2)):

> The signature of a commissioner for oaths in an affidavit showing that it has been sworn before him is an official act and the affidavit must be presumed to have been regularly affirmed even though the jurat is on a completely new page unless the contrary is proved.

and again at the selected portion of p. 560 of the headnote under Held (3) when his Lordship said:

> The fact that the jurat commences on one page and ends on another or that it is on a completely new page will not render the affidavit defective unless there is evidence to the contrary.

As I said earlier there was no need for the jurat to be entitled. Order 41 r. 1(1) of the RHC states that:

> Subject to paragraphs (2) and (3), every affidavit sworn in a cause or matter must be entitled in that cause or matter.

and there is no mention about entitlement to the jurat at all. There is no legal requirement that the jurat must bear the title of the action. Paragraphs (2) and (3) as alluded to in O. 41 r. 1(1) of the RHC merely speak of other matters not relevant to the jurat and those paragraphs are worded as follows:

> (2) Where a cause or matter is entitled in more than one matter, it shall be sufficient to state the first matter followed by the words 'and other matters', and where a cause or matter is entitled in a matter or matters and between parties, that part of the title which consists of the matter or matters may be omitted.
>
> (3) Where there are more plaintiffs than one, it shall be sufficient to state the full name of the first followed by the words 'and others', and similarly with respect to defendants.

Form 78 of the RHC carries the following recital:

> No: 78
> FORMS OF JURAT (O. 41 r. 1)
> (Title as in action)

and it is then followed by four samples or specimens of the jurat itemised as (a), (b), (c), and (d). In so far as encl. 3 was concerned, the sample or specimen (a) was rightly utilised. It is wrong to say that because of Form 78, the jurat must be entitled. It stands to reason if one reads Form 78 with O. 41 r. 1(1) of the RHC as a whole and when seen in that perspective what is required to be entitled is not the jurat but rather the affidavit. To entitle the jurat once again would be superfluous. I would accordingly agree with the judgment of Augustine Paul J in *Mohd Nazir bin Badar Shair v. Timbalan Menteri Dalam Negeri (supra)* in regard to the absence of a requirement under the RHC to entitle a jurat. At p. 566 to p. 567 of the report, his Lordship said:

> One further matter that requires consideration is whether a jurat must carry with it the title of the action pursuant to the judgment in *Han Euu Tiam v. Phang Kui Fatt & Ors* [1999] 4 CLJ 395. If it is so then the affidavits in this case will be defective as they do not have the title. In *Han Euu Tiam* it was held that the jurat must have the title of the action by virtue of the presence of the words '(Title as in action)' appearing at the top of Form 78 of the RHC. In my opinion the need to incorporate the title of the action in the jurat is guided by the heading of Form 78 of the RHC itself which reads as follows:
>
> FORMS OF JURAT (O. 41 r. 1)
>
> The presence of the words in brackets means that the forms provided have in contemplation the whole of O. 41 r. 1 of the RHC. Thus the rule must be read as a whole in order to determine whether the words '(Title as in action)' refer to the jurat or the affidavit itself. In this regard the part of O. 41 r. 1 that warrants consideration is sub-r. (1) which reads as follows:
>
> > Subject to paras (2) and (3), every affidavit sworn in a cause or matter must be entitled in that cause or matter.
>
> This is the only part of O. 41 r. 1 of the RHC which makes reference to the title of the cause or matter. As Form 78 relates to the whole of O. 41 r. 1 of the RHC it must be read together with the sub-rule. It follows that the words '(Title as in action)' relate to the affidavit. Thus what must carry the title of the action is the affidavit and not the jurat.
>
> Thus I hold, and with respect, that the fact that the jurat commences on one page and ends on another or that it is on a completely new page does not render the affidavit defective unless there is evidence to the contrary. I also hold, and with respect, that there is no requirement in O. 41 r. 1 of the RHC or in Form 78 for the jurat to be entitled. Accordingly, I must presume that the three affidavits in question are regular. However, the indorsement required by O. 41 r. 9(2) of the RHC in all the three affidavits is in the following form:

> Afidavit ini difailkan oleh Peguam Kanan Persekutuan bagi pihak responden-responden yang beralamat di Pejabat Peguam Kanan Persekutuan, Kementerian Dalam Negeri, Jalan Dato Onn, 50546 Kuala Lumpur.

> This indorsement is defective as it does not state the dates of swearing and filing of the affidavits. However, as provided by the rule referred to the affidavits, even though defective, may be used with leave of court. But no application has been made by the Respondents for leave to use the affidavits. That compels me to order that the affidavits cannot be used.

Likewise here there was no formal application by Sawal for leave to use the affidavit in encl. 3. With respect, I beg to disagree with that part of the judgment of Hishamudin Yunus J in *Han Euu Tiam v. Phang Kui Fatt & Ors (supra)* when his Lordship held, *inter alia*, that the "title of the action must be stated at the top part of the certificate" – referring, of course, to the jurat (see p. 400 of the CLJ reporting). But I do agree with his Lordship when he said that (see p. 400 of the CLJ reporting):

> But it must now be completed by inserting in the blank spaces within the brackets the words '(interpretation not required)' in the following manner:
>
> (Through the interpretation of (interpretation not required)).

and I too agree with the reasons advanced by his Lordship for adopting this method. At p. 401 of the CLJ reporting, the learned judge said:

> ... the former method is preferable because the jurat would then expressly indicate that the Commissioner (for) Oath(s) signing the jurat had addressed his mind to the question of the deponent's understanding of the language used in the affidavit. Thus, the question of the court making an assumption on the language proficiency of the deponent does not arise.

What was the effect of the non-compliance by Sawal with the first limb to O. 41 r. 1(7) of the RHC immediately after the substantive part of the affidavit had ended – meaning after para. 26? What was the effect of entitling the jurat? It rendered, in my judgment, the affidavit of Sawal in encl. 3 invalid. Without a supporting affidavit in encl. 3, there was no leg for encl. 2 to stand on and, consequently, encl. 2 should be dismissed forthwith. There be no order as to costs. The then Supreme Court in the case of *Syarikat Telekom Malaysia Bhd v. Business Chinese Directory Sdn Bhd* [1994] 2 CLJ 729 emphasised the need to comply with the RHC. Mohd Eusoff Chin SCJ delivering the judgment of the court aptly said in the context of that case at p. 731 of the report:

> We find that O. 92 r. 1 of the Rules of the High Court 1980, is a mandatory provision which requires that any document which is not in the National or in the English language must be translated into the National language before it can be admitted as an exhibit. Further, it has been held by the courts that Rules of Court are to be obeyed. Failure to comply with them will lead to chaos in the conduct of litigation. See *Lee Guat Eng v. Tan Lian Kim* [1985] 2 MLJ 196, *Ratnam v. Cumarasamy & Anor* [1965] 1 WLR 8, PC.

There is another serious defect in the affidavit of Sawal in encl. 3 that needs mention. It is this. Sawal did not depose that he affirmed the affidavit based on information and belief and with that drawback he did not reveal the sources and grounds of the information and belief. Order 41 r. 5 of the RHC is worded in this way:

> (1) Subject to Order 14 rules 2(2) and 4(2), to paragraph (2) of this rule and to any order made under Order 38 rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.
>
> (2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

and it strikes at the very core of the affidavit of Sawal in encl. 3. Enclosure 2 was in the nature of an interlocutory proceeding because it cannot decide the rights of the parties (*Datin Melati Abdullah & Ors v. Syed Hassan Syed Salim* [1999] 5 CLJ 582). There was a certificate of urgency in encl. 4 which showed that encl. 2 was to be heard on an urgent basis. Peter Gibson J in *Savings and Investment Bank Ltd v. Gasco Investments (Netherlands) B.V. And Others* [1984] 1 WLR 271 spoke of circumstances of great urgency in the following context (see p. 282 of the report):

> To my mind the purpose of rule 5(2) is to enable a deponent to put before the court in interlocutory proceedings, frequently in circumstances of great urgency, facts which he is not able of his own knowledge to prove but which, the deponent is informed and believes, can be proved by means which the deponent identifies by specifying the sources and grounds of his information and belief.

But surely no matter how urgent the application in encl. 2 was, that cannot excuse the plaintiffs for not complying with O. 41 r. 5 of the RHC. Bereft of an affidavit in support, the plaintiffs' application in encl. 2 must surely fail. This was my judgment and I so hold accordingly.

Discretionary Remedy

I have yet to go into the merits of encl. 2. I must at once say that the injunctive reliefs sought in encl. 2 were in the nature of an equitable remedy. That being the case, it was entirely at the discretion of this court whether to grant the injunctive reliefs or otherwise. Lord Blackburn in *Richard Wheeler Doherty v. James Clagston Allman and W.C. Dowden* [1878] 3 App Cas 709 aptly said that such discretion that has to be exercised "… is not one to be exercised according to the fancy of whoever is to exercise the jurisdiction of equity, but is a discretion to be exercised according to the rules which have been established by a long series of decisions, ..." But, of course, Lord Diplock in the *American Cyanamid*'s case, correctly known as *American Cyanamid Co. v. Ethicon Ltd* [1975] 1 All ER 504 said at p. 510 at line 'a', that the court's discretion ought not to be fettered by rigid rules.

An *ex parte* interim injunction may be varied or set aside by an *ex parte* application. Put in another way, if an interim injunction is granted *ex parte* in the presence or absence of the defendant, the latter may immediately act by way of an *ex parte* application to discharge or vary the interim injunction (applying the principles enunciated in *Castle Fitness Consultancy Pte Ltd v. Manz* [1990] 1 MLJ 141 at 142 H and *Pickwick International Inc (GB) Ltd v. Multiple Sound Distributors Ltd* [1972] 3 All ER 384 on a wider basis). A refusal by the court to allow the *ex parte* application for an interim injunction does not bar the applicant from applying afresh on an *ex parte* basis for an interim injunction when the procedural defects, like in the present case, have been corrected or when there are new facts that would warrant the fresh *ex parte* application.

I reiterate that encl. 2 should be dismissed forthwith without costs.